In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-821

ALEX HARDING, A/K/A MARK HARDING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's refusal to relieve him of his stipulation that the materials he was charged with unlawfully receiving were obscene, after this Court had remanded (414 U.S. 964) his case for further consideration in light of *Miller* v. *California*, 413 U.S. 15, denied him of his Sixth Amendment right to a jury trial. He further reasserts all contentions raised in his previous petition for a writ of certiorari (No. 72-1646), if this Court had not ruled on those issues in its original consideration of that petition. The contentions thus reasserted are: (1) the indictment fatally failed to allege petitioner's knowledge of the obscene character of the materials; (2) the procedure whereby the materials were identified and brought before the court for seizure was improper; (3) petitioner should be relieved of the stipulation of obscenity because it rests upon questions of

law as well as questions of fact; and (4) the trial judge abused his discretion in admitting a prior felony conviction to impeach petitioner's testimony.

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of having knowingly received from an express company obscene materials which were then being transported in interstate commerce, in violation of 18 U.S.C. 1462. He was sentenced to two years imprisonment. The court of appeals affirmed (475 F.2d 480). This Court remanded (414 U.S. 964) for further consideration in light of *Miller* v. *California*, *supra*, and its companion cases.[1]

The court of appeals remanded to the district court (491 F.2d 697) and the district court held a hearing to consider whether the changed standard of obscenity announced in *Miller* could possibly alter the original verdict. The district court, after viewing some of the material (R. 2-3),[2] held that the material was obscene under either standard and that petitioner could not therefore be relieved of his stipulation. The court of appeals affirmed on October 3, 1974 (Pet. App.). The petition for a writ of certiorari was not filed until December 30, 1974, and is therefore untimely under Rule 22(2) of the Rules of this Court. In any event, petitioner is not entitled to the relief he seeks.

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[1] *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *Kaplan* v. *California*, 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123; *United States* v. *Orito*, 413 U.S. 139; *Heller* v. *New York*, 413 U.S. 483; *Roaden* v. *Kentucky*, 413 U.S. 496; *Alexander* v. *Virginia*, 413 U.S. 836.

[2] "R" refers to the reporter's transcript of the district court's hearing of March 1, 1974, which was held pursuant to the mandate of the court of appeals.

A detailed statement of the facts of this case is contained in the government's brief in opposition (pp. 2-5) to petitioner's original petition for a writ of certiorari (No. 72-1646). In brief, the evidence showed that on January 14, 1971, a twelve-pound carton containing allegedly obscene materials was delivered to Emery Air Freight, Los Angeles, California, for transmittal to Ace Books, 3220 Wyandot Street, Denver, Colorado. The package was mailed C.O.D. and the air bill advised "please call this number on arrival," giving a telephone number listed for Alex, or Mark, Harding. An Emery agent, whose suspicions had been aroused, opened the carton, inspected the materials and notified the FBI.

On January 19, the package was delivered to Denver and the addressee notified of its arrival. An employee of the addressee picked up the package and was immediately served with a court order to take the materials to court. The court found the materials to be obscene and allowed the government to seize them. Petitioner was thereafter arrested.

Petitioner's trial and the court of appeals' original affirmance of the conviction (475 F.2d 480) both occurred prior to this Court's decision in *Miller* v. *California*, *supra*. Thus, the trial and appellate reviews were conducted under the *Roth-Memoirs* test of obscenity,[3] which prevailed at that time.

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[3] *Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

At trial petitioner stipulated that the materials are obscene.[4] Petitioner now seeks to avoid this stipulation, asserting that he never would have made it if the *Miller* standard of obscenity had been applicable at that time.

1. Petitioner's contention rests on his assertion that had he known that obscenity would be determined in accordance with "local" standards rather than a "national" standard, he would have placed the issue of obscenity before the jury. Thus, he claims, the failure of the district court to allow him to revoke the stipulation, and that court's determination that the materials are obscene under the *Miller* standard, denied him his right to a jury trial.

The court of appeals, in a decision upon which we primarily rely, first noted that the district court's decision could be affirmed on the basis that it complied with this Court's mandate, inasmuch as in remanding the case this Court did not specify any particular procedures to be followed.[5] On remand from this Court, the court of appeals observed (491 F.2d at 699):

> [T]he new standards are less exacting to the prosecution. Thus proof of obscenity is much less difficult under these standards. We believe that material

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[4]In its first opinion, the court of appeals stated:

> Undoubtedly the defendant so stipulated in order to avoid submission of the material to the jury. He wished to avoid the prejudice which would flow from the jury's examination of the written and pictorial material which was described by the trial judge as hard core. [475 F.2d at 484.]

[5]The terms of the remand are as follows:

> * * * that this cause be, and the same is hereby, remanded * * * for further consideration in light of *Miller* v. *California*, 413 U.S. 15 (1973); [and its companion cases].

> found to be obscene under the *Roth-Memoirs* test would unquestionably satisfy the test contained in *Miller*.

Nevertheless since it did not have the materials before it, the court of appeals remanded to the district court "for the purpose of a hearing at which the court should examine the materials and determine whether these materials are indeed obscene under the *Miller* test" (491 F.2d at 699).

The district court, with petitioner present, held such a hearing and reviewed the materials. It held that the materials were obscene under *Miller* and that there existed no grounds for relieving petitioner of the stipulation. Thus, the mandate of this Court was fulfilled.

The court of appeals also noted that this Court's decision in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974, supported the district court's action and decision in this case. As in the present case, *Hamling* involved obscenity convictions which occurred, and were affirmed by the court of appeals, prior to the *Miller* group of cases. This Court rejected the contention there that the defendants were denied the benefit of *Miller* because the jury was instructed to apply national standards in determining obscenity. The Court held that its *Miller* decision "did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula * * * " (slip op. at 14), but that whether a national or local standard is used, the jury's determination must be objective and not subjective (slip op. at 17). This Court then concluded (slip op. at 17-18):

> In the unusual posture of this case, in which petitioners agree that the challenged instruction was proper at the time it was given by the District Court, but now seek to claim the benefit of a change in the law which casts doubt on the correctness of portions of it, we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury [citations omitted]. Our examination of the record convinces us that such a probability does not exist in this case.

Likewise, the district court in the present case reviewed the material and determined that it was obscene under any standard. Therefore, it refused to relieve petitioner of the stipulation. The court of appeals approved the district court's action as follows (Pet. App. 5-A):

> At bar appellant asserts that his stipulation was made in relation to a national standard, whereas the recent Supreme Court decisions hold that the juror is entitled to consider the community standard. But the Court did not say that a juror is constitutionally limited to considering local standards. The trial court determined that the materials in question would be found obscene under contemporary community standards, and hence we fail to see that there could be any prejudice as a result of the stipulation of obscenity.

The court of appeals' ruling was correct. It was not necessary to have a new trial so that a jury could determine obscenity under the *Miller* standard. See *United*

States v. *Groner*, 494 F.2d 499 (C.A. 5), certiorari denied, No. 73-1932, November 11, 1974; *United States* v. *Cote*, 485 F.2d 574 (C.A. 5), certiorari denied, No. 73-908, July 25, 1974; *United States* v. *Thevis*, 484 F.2d 1149 (C.A. 5), certiorari denied, No. 73-1075, July 25, 1974.

Petitioner, however, asserts that this case is distinguishable from *Hamling* and the other cases cited above in that those cases did not involve stipulations that the materials were obscene. But the fact that petitioner so stipulated does not call for a different result. *Miller* recognized that obscenity is a question of fact for the jury. 413 U.S. at 24, 31-32, 33. This being so, the obscenity of materials may be stipulated to by a defendant and the general rule is that such stipulations freely entered into are conclusive and binding on the courts and relief therefrom after judgment is warranted only under exceptional circumstances. *United States* v. *Campbell*, 453 F.2d 447, 451 (C.A. 10); *Fenix* v. *Finch*, 436 F.2d 831, 837 (C.A. 8); *Farmers Co-Operative Elevator Association Non-Stock of Big Springs, Nebraska* v. *Strand*, 382 F.2d 224, 231 (C.A. 8), certiorari denied, 389 U.S. 1014; *Jackson* v. *United States*, 330 F.2d 679, 681 (C.A. 8), certiorari denied, 379 U.S. 855. Thus, stipulations as to fact have the same practical effect as a jury's findings.

Petitioner chose to stipulate that the materials are obscene rather than have them shown to and evaluated by the jury. On direct appeal from the conviction, this would have precluded petitioner from claiming that the materials were not obscene, *Spillman* v. *United States*, 413 F.2d 527, 531 (C.A. 9), certiorari denied, 396 U.S. 930, and petitioner could not claim that he was denied his right to a jury trial on the issue of obscenity.

Petitioner's similar contention here also must fail. He was afforded every right to which he is entitled. He received a trial by jury on all disputed issues, limited only by his own stipulation that the materials are obscene. Thereafter, he was afforded a full hearing and a judicial determination whether the standard enunciated in *Miller* could benefit him. Petitioner has not demonstrated the necessary exceptional circumstances which would justify relieving him from his stipulation and granting him a new trial.

2. Petitioner reasserts all issues raised in his previous petition for a writ of certiorari (No. 72-1646). We rely upon our original brief in opposition in that case. With respect to the argument regarding the *scienter* element of the crime (Argument, para. 1, p. 5), further support for our position is found in *Hamling* v. *United States*, *supra*, slip op. at 29-34, where this Court reaffirmed its holding in *Rosen* v. *United States*, 161 U.S. 29, and cases subsequent thereto, that the *scienter* requirement is satisfied if the prosecution shows that the defendant had knowledge of the actual character of the contents of the package.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.